

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Judge: Hon. Louisa S. Porter

1 The parties file this joint discovery motion seeking the Court's guidance on three discovery
2 disputes concerning: (1) the deadline to complete limited discovery; (2) the key words used to conduct
3 searches for responsive electronically-stored information ("ESI") in Defendants' possession, custody or
4 control; and (3) the production of minimum advertised price ("MAP") policies. The first two issues are
5 global issues affecting all aspects of the parties' limited discovery efforts, while the third issue relates to
6 a specific request for production of documents made to each Defendant.

7 Defendants respectfully request a hearing before the Court regarding these issues. Defendants
8 believe a hearing is needed due to the variations among the defendants in their negotiated agreements
9 with plaintiffs and their responses to plaintiffs' discovery requests.

10 **ISSUE NO. 1:**

11 Plaintiffs request that the deadline to complete limited discovery be extended from December 23,
12 2011, to February 1, 2012.

13 **DEFENDANTS' RESPONSE REGARDING ISSUE NO. 1:**

14 Defendants object to Plaintiffs' request to further extend the discovery deadline from December
15 23, 2011 to February 1, 2012 because it is unwarranted and is not based on good cause.

16 **PLAINTIFFS' REASONS THE DISCOVERY DEADLINE SHOULD BE EXTENDED:**

17 In the portion of the Court's Order on Defendants' motion to dismiss that provides for limited
18 discovery, Judge Burns set February 1, 2012 as a proposed outside date by which such discovery should
19 be completed. (*See* Dkt. No. 45 at 13). Given production delays that have occurred since the date the
20 parties filed their stipulation to extend the original discovery deadline of December 1, 2011, Plaintiffs
21 now request that the your Honor adopt February 1, 2012 as the deadline for completion of such limited
22 discovery. Plaintiffs' reasons for the requested order are set forth below.

23 As detailed in Plaintiffs' accompanying memorandum, Plaintiffs have diligently pursued the
24 discovery afforded by Judge Burns' order. Plaintiffs drafted and served a limited set of interrogatories
25 (5-6 per Defendant) and document requests (3-4 per Defendant) on October 5, 2011 – one day after the
26 parties appeared before your Honor for an initial discovery conference. Plaintiffs received Defendants'
27 responses on November 7 and 8. Defendants' responses illustrated a fundamental difference in opinion

1 between the parties regarding the scope of discovery permitted under Judge Burns' Order. In an effort
2 to resolve these differences, Plaintiffs engaged in over 13 meet and confer calls and over 30 e-mail
3 exchanges with six different groups of defense attorneys. As of November 23, 2011, eight days from
4 the original December 1, 2011 deadline, only three Defendants had produced document productions.
5 The parties then stipulated to an extension of the discovery period to allow Defendants to promptly
6 complete their document productions and permit Plaintiffs sufficient time to review the productions,
7 identify deponents, and schedule and complete depositions of Defendants' record custodians and
8 witnesses.

9 As detailed in Plaintiffs' accompanying memorandum, however, there were additional
10 production delays that followed. In light of these delays, Plaintiffs requested agreement to a further
11 discovery extension, this time to the February 1, 2012 deadline outlined in Judge Burns' Order. To
12 achieve compliance with that deadline, Plaintiffs wrote to all Defendants and proposed that: (a)
13 Defendants complete their document productions by December 9, 2011; (b) the parties meet and confer
14 during the week of December 12, 2011 to schedule a targeted set of depositions that accommodate the
15 various witness' schedules; and (c) the parties work cooperatively to schedule and complete depositions
16 at mutually-convenient dates in December 2011 and January 2012.

17 At this point, Plaintiffs cannot reasonably review the late-arriving productions, analyze the
18 interaction of all seven productions, effectively identify appropriate deponents, and schedule and
19 complete meaningful depositions by December 23. This is not a case in which each Defendants'
20 document production stands distinct from and unaffected by all others' productions; rather, the limited
21 discovery is aimed at uncovering meetings between Defendants, and thus the documents produced by
22 each Defendant may inform Plaintiffs understanding of other Defendants' conduct. Attempting to
23 squeeze the necessary document review, scheduling, travel, and depositions into the eleven days
24 between the last Defendant production and the current discovery deadline will not allow for an efficient
25 or cost-effective discovery process and will not serve the interests of justice.

26 Plaintiffs have an additional good faith basis for requesting that the Court set February 1, 2012 as
27 the discovery deadline for the limited discovery deadline, which was not apparent to Plaintiffs until this
28

1 morning. In an effort to proceed as expeditiously as possible, Plaintiffs promptly scheduled and
2 commenced the deposition of the first defense witness, Yamaha Corporation of America Senior Vice-
3 President Tom Sumner for December 15, 2011. A dispute arose about the scope of Judge Burns' order
4 with respect to the discovery that may be obtained from Defendants regarding who attended or
5 participated in meetings at the trade shows alleged in the amended consolidated complaint. Defendants
6 have collectively taken the position that the order permits discovery only of "private meetings" among
7 one or more of the Defendants, and will not permit witness testimony beyond that. The parties will meet
8 and confer on this issue and contact the Court; if the Court requests, the parties will submit additional
9 briefing on the issue at the Court's direction. Setting the discovery deadline for February 1, 2011 – the
10 outside date originally contemplated by Judge Burns' order – will enable the Court to resolve these
11 issues before more depositions are scheduled.

12 Plaintiffs' requested extension is reasonable. Rather than assess the completeness and impact of
13 each Defendant's document production on the entirety of the discovery produced, Plaintiffs' alternative
14 is to request depositions from most (if not all) of the 56 custodial witnesses identified by Defendants.
15 Plaintiffs do not believe that option comports with purpose of the federal rules, which is to maximize the
16 efficiencies of the discovery process. Extending the discovery deadline to February 1, 2012 – the
17 outside deadline contemplated by Judge Burns' order – accomplishes these objectives, gives the parties
18 a date certain by which to complete the limited discovery, and provides one deadline (rather than
19 several) after which Plaintiffs may further amend their complaint in light of the discovery obtained.

20 **DEFENDANTS' BASIS FOR OBJECTING TO AN EXTENSION:**

21 Defendants oppose the extension of the discovery deadline requested by Plaintiffs. While good
22 cause for the granting of another extension is lacking with respect to all Defendants, it is especially
23 lacking with regard to those Defendants who responded completely to Plaintiffs' discovery requests
24 many weeks ago. Defendants, however, do not object to Plaintiffs taking, after December 23, 2011,
25 depositions that already have been noticed or otherwise specifically identified by Plaintiffs [i.e., as of
26 December 14, 3pm], but for which the deponent is unavailable to appear prior to the December 23
27 deadline.

1 As described in more detail in Defendants' accompanying memorandum, Plaintiffs do not and
2 cannot demonstrate the good cause required to justify their request for a further extension of the
3 discovery deadline. Plaintiffs were not diligent in pursuing discovery from Defendants and, in any
4 event, have been in possession of Defendants' complete interrogatory answers as well as substantial
5 document productions for many weeks prior to the December 23, 2011 discovery deadline.
6 Nevertheless, Plaintiffs failed to request their first deposition -- whether of an individual or a 30(b)(6) --
7 until December 9, 2011, and at the same time declared themselves unavailable to conduct depositions on
8 almost half of the remaining business days between now and the December 23, 2011 discovery
9 deadline. Had the Plaintiffs been diligent in pursuing discovery against the Defendants, they would
10 have had more than ample time to complete the deposition discovery they now seek to defer under their
11 proposed 5-week extension period.

12 Plaintiffs' sole justification for the requested extension is their unsupported assertion that they
13 could not begin an efficient deposition process until they received the last document from the last
14 Defendant who produced documents. There is no legal basis for this position. As Plaintiffs'
15 acknowledge, they already were in possession of three of the Defendants' document productions, as well
16 as interrogatory answers from all Defendants no later than November 23, 2011. These responsive
17 materials, as well as whatever investigation Plaintiffs conducted before filing their Complaint, provided
18 more than a sufficient basis for Plaintiffs to identify at least a number of deponents,
19 including representatives of the producing Defendants, and to complete their depositions prior to
20 December 23, 2011. Moreover, at any point in discovery, Plaintiffs could have served Rule 30(b)(6)
21 notices requiring Defendants to produce knowledgeable corporate designees. Furthermore, Plaintiffs
22 would have received completed productions from all Defendants much sooner had Plaintiffs acted
23 diligently after Judge Burns issued his August 22, 2011 Order permitting limited discovery or had
24 Plaintiffs taken the opportunity to discuss search terms with Defendants when Defendants approached
25 them to do so even before written discovery responses were due. Plaintiffs should not be permitted to
26 cure their own inaction by inflicting another five weeks of burdensome, costly, and distracting discovery
27 on all of the Defendants.

1 As indicated above, however, Defendants do not object to Plaintiffs taking, after December
2 23, 2011, depositions that already have been noticed or otherwise identified by Plaintiffs, but for which
3 the deponent is unavailable to appear prior to the December 23 deadline.

4 Finally, Mr. Sumner's deposition should be of no moment and should not affect any discovery
5 deadline. In an apparent effort to manufacture an excuse for the extension they seek, Plaintiffs
6 purposefully exceeded the scope of Judge Burns' Order in the deposition. First, when this dispute arose,
7 rather than follow the Court's procedures and contact the Court during the deposition to obtain a
8 resolution (when counsel for all parties were already available), Plaintiffs suspended the deposition and
9 now seek to use their own conduct and their own choice not to delay seeking any resolution as a means
10 to obtain an extension. Second, as Plaintiffs admit, without a meet and confer the scope of this dispute
11 remains unclear and is not ripe for consideration. Third, the objections made with respect to Mr.
12 Sumner's deposition, was that the questioning went beyond the scope of Judge Burns' order in asking
13 general open-ended questions about MAP policies that had nothing to do with meetings with
14 competitors, meetings with Guitar Center or meetings of any type what-so-ever. Plaintiffs have not
15 accurately represented the dispute and objections. Plaintiffs were given an opportunity and encouraged
16 to ask questions regarding all "meetings alleged in the amended complaint and what was said or agreed
17 to there" (Dkt. No. 133 at 13) and they refused to continue.

18 **ISSUE NO. 2**

19 Plaintiffs request that each Defendant (1) identify abbreviations or acronyms commonly used
20 within the Defendant corporation for any of the agreed-upon search terms, or affirmatively state that no
21 abbreviations or acronyms are commonly used; (2) state whether the Defendant included all identified
22 abbreviations and acronyms in its search for responsive documents; and (3) if abbreviations and
23 acronyms were identified but not included in Defendant's search, re-run its search and produce new
24 responsive documents.

25 **DEFENDANTS' RESPONSE REGARDING ISSUE NO. 2:**

26 Defendants object to this request because it is untimely, unduly burdensome, and inconsistent
27 with the previously negotiated discovery responses.

PLAINTIFFS' REASONS DEFENDANTS SHOULD IDENTIFY ABBREVIATIONS AND ACRONYMS AND RE-RUN DOCUMENT SEARCHES IF THESE WERE NOT USED:

Despite Plaintiffs' requests, Defendants have been unwilling to provide adequate information about the source, location or form of potentially discoverable documents for Plaintiffs to make intelligent decisions about search terms. In an effort to resolve disputes over the scope and burden of discovery, Plaintiffs nonetheless made a good faith effort to work with and modify the search terms proposed by Defendants, and the search protocols agreed to by November 23 included search terms discussed by the parties.

After reviewing initial document productions, it became clear that some Defendants use abbreviations and acronyms for some of the search terms agreed upon during the parties' meet and confer sessions. Plaintiffs asked each of the Defendants to confirm that their searches included internal abbreviations or acronyms, such as "GC" for "Guitar Center" or "GMI" for "Gibson" (though the actual terms would vary depending on common usage within each Defendant). Only one Defendant, NAMM, confirmed that it had included appropriate abbreviations and acronyms in its search protocol. The other defendants stated they had searched only the precise terms agreed to in the meet and confer process and would not conduct additional searches.

A good faith search must recognize that effective search terms cannot be identified in an information vacuum and that a party's "human knowledge" should be utilized to craft keyword searches that are responsive to the "inherent malleability and ambiguity of spoken and written English." See *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 201, 209 (2007). Until Defendants started actually producing documents, Plaintiffs didn't know what abbreviations or acronyms each Defendant uses in referring to themselves, their divisions or each of the other Defendants. In the course of the meet and confers, Defendants should have told Plaintiffs about the commonly used abbreviations and acronyms, and a good-faith search effort should have included them with the agreed-upon search term concepts. See *In re Seroquel Products Liability Litigation*, 244 F.R.D. 650, 662 (M.D. Fla. 2007) ("[W]hile key word searching is a recognized method to winnow relevant documents from large repositories, use of this

technique must be a cooperative and informed process.”); *In re Priceline.com Inc. Securities Litigation*, 233 F.R.D. 88, 91 (D. Conn. 2005) (“Defendants shall also seek input from plaintiffs regarding a proposed search terms. Plaintiffs may seek a court order directing a more inclusive search.”)

DEFENDANTS’ BASIS FOR REFUSING TO IDENTIFY ABBREVIATIONS AND ACRONYMS AND RE-RUN DOCUMENT SEARCHES IF THESE WERE NOT USED :

The document requests served on Guitar Center and the manufacturing defendants (“Defendants”) all exceeded the scope of the limited discovery permitted by Judge Burns’ order. Nonetheless, before the due date for Defendants’ discovery responses, defendants contacted Plaintiffs’ counsel and offered to voluntarily produce certain documents and offered to meet and confer regarding search terms for Defendants’ ESI. On October 31 and November 1, 2011, plaintiffs wrote to the respective Defendants to say that plaintiffs were declining Defendants’ offers to meet and confer regarding search terms, and that Defendants should craft suitable search terms on their own.

On November 3 and 4, each defendant (except for NAMM, whose discovery responses are not presently at issue) sent a letter to counsel for Plaintiffs that detailed the specific searches they were planning to run, which included variations on the key terms “MAP” and “NAMM.” In other words, the original terms included the key terms likely to generate discoverable information about discussions of MAP policies at NAMM events. Even with the Defendants’ proposed search terms in hand, Plaintiffs did not request any additional search terms or raise any objections.

Weeks later, after several Defendants already had undertaken the substantial burden and expense of reviewing documents—and after several of the Defendants had already substantially or fully completed their productions—Plaintiffs contacted the Defendants to offer input regarding search terms for the first time. Defendants could have reasonably refused this belated effort by plaintiffs to revisit on search terms in light of Plaintiffs’ demand that Defendants craft search terms on their own. Instead, each defendant negotiated a specific agreement with plaintiffs to expand the search terms that Defendants had either already run or were in the process of running; this agreement to expand the terms was part of an overall agreement that resolved all outstanding disputes related to the scope and timing of discovery. In the individually-tailored agreements they reached with each defendant, Plaintiffs

1 specified a set of final search terms that defendants would run, which did not contain any abbreviations
2 for the Defendants' company names—even though Plaintiffs had been in possession of documents
3 produced by Defendants which indicated that abbreviations are used from time to time. At Plaintiffs'
4 request, several Defendants even agreed to amend their FRCP responses to specify the search terms that
5 were agreed to and used as part of this resolution of all outstanding discovery disputes. Defendants ran
6 the terms through tens, if not hundreds, of thousands of documents. The number of documents actually
7 responsive under the parties' agreements represented a mere fraction of the documents searched—in
8 some cases, less than 1% of the documents searched were responsive. In other words, the search terms
9 were already substantially overbroad.

10 On November 30, Plaintiffs wrote Defendants to request that Defendants go back and run
11 abbreviations for the Defendants' company names as search terms. This request was made after several
12 of the Defendants' document productions were already complete and the remaining Defendants were
13 finalizing their productions. Defendants declined this request because Plaintiffs had entered into
14 agreements with Defendants regarding search terms and, in reliance on that agreement, Defendants then
15 ran the search terms Plaintiffs provided to Defendants and produced documents to Plaintiffs. Moreover,
16 some Defendants, like Guitar Center, had already produced documents using the abbreviations Plaintiffs
17 are now requesting when Plaintiffs negotiated the final search terms with them, and thus Plaintiffs
18 cannot in good faith claim they did not know about these abbreviations. While some Defendants do on
19 occasion use "GC" for Guitar Center, Plaintiffs agreed during the negotiating sessions with some
20 manufacturing Defendants that "Guitar Center" would not be searched, since that search would produce
21 a voluminous number of unresponsive documents as Guitar Center is the largest customer of the
22 manufacturing Defendants and any relevant documents would be picked up by the use of the other
23 agree-to search terms. For several Defendants, like Gibson, Hoshino, and Yamaha, Plaintiffs have been
24 informed that these defendants do not commonly use any acronyms for the names of other defendant
25 manufacturers and thus, even setting aside the Plaintiffs' earlier agreements as to search terms, Plaintiffs
26 cannot in good faith persist in asking that the abbreviations be run.

Respectfully, the Court should insist that Plaintiffs abide by agreements negotiated in good faith (especially where the Defendants incurred substantial expense *as a result of the agreement* and this is supposed to be a *limited discovery period*). In addition, courts should be hesitant to second guess agreements as to search terms:

The preferable method to reduce challenges [to the choice of search methodology] - advocated by the proponents of the 2006 Federal Rules Amendments and experienced practitioners - is for a full and transparent discussion among counsel of the search terminology. Where the parties are in agreement on the method and a reasonable explanation can be provided, it is unlikely that a court will second-guess the process.

The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery, 8 Sedona Conf. J. 189, 204 (Fall 2007). If the plaintiffs truly believe that additional searches should be run in this limited discovery period, they should bear the cost of running the searches and conducting the review.

ISSUE NO. 3:

Plaintiffs request that each defendant produce all documents that reflect the terms and effective dates of any MAP policy in effect at any time between January 1, 2004 and July 31, 2008. This request was initially stated in Plaintiffs First Set of Requests for Production of Documents to NAMM as request No. 3 and to Fender, Kaman, Hoshino, Gibson, and Guitar Center as request No. 4 as "All documents that reflect the terms and effective dates of any MAPP."

DEFENDANTS' RESPONSE REGARDING ISSUE NO. 3:

Defendants object to this request because it is beyond the scope of Judge Burns' August 22, 2011 order, it is inconsistent with the prior agreement on the scope of discovery negotiated by the parties, and it is untimely and unduly burdensome.

PLAINTIFFS' REASONS WHY MAP POLICIES SHOULD BE PRODUCED:

In their requests to produce documents, Plaintiffs asked that each Defendant produce all documents that reflect the terms and effective dates of any MAP policy. Because MAPs are the mechanisms by which Plaintiffs allege Defendants implemented their conspiracy, Plaintiffs interpret Judge Burns' Order as encompassing the MAPs. Similar terms and conditions and simultaneous policy

1 amendments by multiple Defendants may constitute circumstantial evidence of the private meetings
2 alleged in the complaint and what was said and agreed to at those meetings. The FTC, for instance, has
3 cited similarities across MAP policies as strong evidence of anticompetitive behavior in the compact
4 disc industry.

5 All defendants initially refused to provide MAP policies (unless otherwise responsive to another
6 request). Two defendants, however, ultimately agreed to provide documents referencing changes to
7 MAP policies, which resulted in the production of some policies. Review of those few MAP policies
8 has reinforced Plaintiffs' view that these materials are highly relevant to the conspiracy allegations,
9 provide circumstantial evidence of Defendants' anticompetitive conduct, and fall well within the scope
10 of Judge Burns' Order permitting limited discovery to support Plaintiffs' allegations.

11 **DEFENDANTS' BASIS FOR THEIR OBJECTIONS TO PRODUCING MAP POLICIES:**

12 This request is beyond the scope of Judge Burns' order, which states that "[d]iscovery should be
13 limited to who attended or participated in meetings alleged in the amended consolidated complaint and
14 what was said or agreed to there." (Dkt. No. 133 at 13). MAP policies are discussed in Judge Burns'
15 order but the order does not permit discovery of the terms of the manufacturer defendants' MAP
16 policies. Further, although outside the scope of the Court's order, the parties met and conferred in good
17 faith and agreed that if the word search described above returned a non-privileged document in existence
18 reflecting a discussion with a defendant about the terms or effective dates of a MAP policy for a relevant
19 product, and the discussion took place at one of the relevant NAMM shows, it would be produced. The
20 parties agreed as to what types of documents would be produced. After relying on this agreement,
21 defendants completed their document productions, only to have plaintiffs back out of the agreement and
22 request more documents.

23
24 //

25 //

26 //

27 //

1 DATED: December 15, 2011

GIRARD GIBBS LLP

2 By: /s/ Elizabeth C. Pritzker

3 601 California Street, 14th Floor
4 San Francisco, CA 94108
5 Telephone: (415) 981-4800
6 Facsimile: (415) 981-4846

7 Lead Liaison Counsel for Plaintiffs

8 DATED: December 15, 2011

LATHAM & WATKINS LLP

9 By: /s/ Brian Berry

10 505 Montgomery Street, Suite 2000
11 San Francisco, California 94111-6538
12 Telephone: (415) 395-8157
13 Facsimile: (415) 395-8095

Attorneys for Defendant Guitar Center, Inc.

14 DATED: December 15, 2011

BAKER BOTTS LLP

15 By: /s/ Stephen Weissman

The Warner

16 1299 Pennsylvania Avenue, NW
17 Washington, DC 20004-2402
18 Telephone: (202) 639-7700
19 Facsimile: (202) 639-7890

20 Attorneys for Defendant National Association of
Music Merchants, Inc.

21 DATED: December 15, 2011

**ECKERT SEAMANS CHERIN
& MELLOTT LLP**

22 By: /s/ Keith E. Smith

23 Two Liberty Place
24 50 South 16th Street, 22nd Floor
25 Philadelphia, PA 19102
26 Telephone: (215) 851-8400
27 Facsimile: (215) 851-8383

Attorneys for Defendant Hoshino (U.S.A.), Inc.

DATED: December 15, 2011

BRYAN CAVE LLP

By: /s/ J. Alex Grimsley

One Renaissance Square
Two North Central Avenue, Suite 2200
Phoenix, Arizona 85004-4406
Telephone: (602) 364-7000
Facsimile: (602) 364-7070

Attorneys for Defendants Fender Musical
Instruments Corp. and Kaman Music Corp. (now
known as KMC Music, Inc.)

DATED: December 15, 2011

RILEY WARNOCK & JACOBSON, PLC

By: /s/ Tim Harvey

1906 West End Avenue
Nashville, Tennessee 37203
Telephone: (615) 320-3700
Facsimile: (615) 320-3737

Attorneys for Defendant Gibson Guitar Corp.

DATED: December 15, 2011

CROWELL & MORING LLP

By: /s/ Daniel A. Sasse

3 Park Plaza
Irvine, California 9264T
Telephone: (949) 263-8400
Facsimile: (949) 263-8414

Attorneys for Defendant Yamaha Corp. of America

ECF FILER'S ATTESTATION

I, Elizabeth C. Pritzker, as the e-filing counsel, attest that concurrence in filing this document has been obtained from Daniel A. Sasse, Tim Harvey, J. Alex Grimsley, Stephen Weissman, Brian Berry and Keith E. Smith. I will maintain a record of the concurrence for subsequent production to the Court if so ordered or for inspection upon request by a party until one year after final resolution of the action.

Dated: December 15, 2011

By: /s/ Elizabeth E. Pritzker

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2011 I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 15, 2011.

/s/ Elizabeth C. Pritzker

Elizabeth C. Pritzker

GIRARD GIBBS LLP
601 California Street, 14th Floor
San Francisco, CA 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846